No. 16-1466

IN THE

Supreme Court of the United States

MARK JANUS,

Petitioner,

v.

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31, *ET AL.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN, INC., IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

Public Citizen, Inc., is a non-profit advocacy organization that appears on behalf of its nationwide membership before Congress, administrative agencies, courts, and state governments on a wide range of issues. Public Citizen works for enactment and enforcement of laws to protect consumers, workers, and the public, and to foster open and fair governmental processes.

Public Citizen has an interest in protection of the rights of public employees, including their free speech rights. At the same time, Public Citizen is concerned that First Amendment claims, and specifically claims concerning compelled speech, may be invoked in settings where they serve not to protect individual rights, but to inhibit legitimate actions of government aimed at protecting interests of workers, consumers, and citizens.

Public Citizen therefore believes that the resolution of First Amendment challenges necessarily requires a sensitive assessment of the interests at issue—an assessment that examines not only the nature of the speech at issue, but also the nature of the challenged governmental activity, both of which may affect the applicable level of scrutiny. In this case, where the challenged imposition of agency fees to finance collective-bargaining-related activities of public employee unions

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[1] This brief was not authored in whole or part by counsel for a party. No one other than amicus curiae made a monetary contribution to preparation or submission of this brief. General letters of consent to the filing of amicus briefs from counsel for all parties are on file with the Clerk.

involves action by the government in its proprietary capacity as employer, the level of First Amendment scrutiny is reduced. In this context, the appropriate level of scrutiny condemns restrictions on public employees who speak out on issues of public concern without disrupting the function of their government employers. The appropriate level of scrutiny should not, however, prevent the government, as employer, from managing its relations with employees by recognizing and assuring funding for a bargaining representative to act as its negotiating counter-party to arrive at and implement collective bargaining agreements establishing terms and conditions of government employment.

Public Citizen submits this brief in the hope that a short discussion of how application of First Amendment doctrines are affected by the capacity in which the government acts may assist the Court in concluding that the holding of *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), under which public employee union agency fees have been held constitutional for decades, should not be overruled.

SUMMARY OF ARGUMENT

Central to the arguments against the constitutionality of agency fees for union-represented public employees is the view that the activities those fees support are, for First Amendment purposes, indistinguishable from political advocacy and lobbying on matters of public policy. That view ignores that public employees' bargaining representatives interact with the government in its proprietary role as employer and overseer of public workplaces, not in its capacity as sovereign.

This Court has long recognized that the application of constitutional principles to governmental activities

may vary depending on the capacity in which the government acts. When the government acts as a market participant or property owner, as opposed to as sovereign, its interests and needs more closely resemble those of private entities. And the constitutional strictures to which it is subject reflect the different considerations that are appropriate in light of the functions the government is performing.

In cases raising free speech issues, as in cases involving other constitutional principles, the capacity in which the government acts has a material bearing on the First Amendment's application to government actions that affect speech interests. Performance of proprietary functions, for example, is less likely to involve creation of public forums in which individual speech rights are most robust. And when the government acts in the specific proprietary capacity of employer, its interests in effective management of its workplaces—interests similar to those of private employers—are reflected in a mode of First Amendment analysis that is less stringent than that applied when the government, as sovereign, seeks to limit speech by citizens. That analysis reflects both the Court's recognition that the government as proprietor of the workplace must have a certain amount of freedom to manage its own operations, and its view that the interest of employees in speaking about workplace matters—terms and conditions of employment and internal grievances—is less central to the First Amendment's protections than is the interest of members of the public in speaking about broader matters of public policy and public concern.

These principles are relevant here because, when negotiating the terms of employment of its workers and addressing employee grievances, the government

acts in its proprietary capacity as employer. Providing for the funding of a bargaining representative through which workers participate in the process of ordering their employment relationship with the government falls well within the permissible scope of government action in that capacity and does not violate the First Amendment rights of workers, even if they might prefer to negotiate with their employer themselves. Indeed, the funding of the representative through fees paid by the employees, properly considered, represents no more of an infringement on First Amendment rights than does the government's decision to engage in collective bargaining, the constitutionality of which is undisputed.

ARGUMENT

I. The government's actions in its proprietary capacity, including its capacity as employer, are subject to less intensive First Amendment scrutiny than its actions as sovereign.

This Court has long recognized that the resolution of questions about the scope and application of constitutional doctrines "must take into account the context in which they arise." *NASA v. Nelson*, 562 U.S. 134, 148 (2011). The relevant context typically includes the "capacity" in which the government has taken a challenged action, because constitutional limitations often apply more stringently when the government acts in its "sovereign" lawmaking capacity to regulate the conduct of citizens than when it acts in its "proprietary" capacity as a market participant or manager of its property and internal operations. *See id.*

The distinction between the constitutional limits applicable when the government acts in its sovereign

and proprietary capacities runs through a number of constitutional doctrines. Perhaps most familiarly, the distinction dictates different levels of Commerce Clause scrutiny when a state government acts as a market participant engaging in commerce and when it acts as a regulator of commerce. *See, e.g.*, *White v. Mass. Council of Constr. Employers, Inc.*, 460 U.S. 204 (1983); *Reeves, Inc. v. Stake*, 447 U.S. 429, 436–39 (1980); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 805–10 (1976). In that setting, the doctrine reflects the insight that "[t]here is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market." *Reeves*, 447 U.S. at 437. The distinction recognizes that "[w]hen a State buys or sells, it has the attributes of both a political entity and a private business," *id.* at 439 n.12, as well as that governments have a strong and legitimate "interest in retaining freedom to decide how, with whom, and for whose benefit to deal," *id.* at 438 n.11.

These considerations are not limited to the Commerce Clause. Rather, "the fact that the government is acting in a proprietary capacity, analogous to that of a person managing a private business, is often relevant to constitutional analysis." *Bonidy v. USPS*, 790 F.3d 1121, 1126 (10th Cir. 2015) (Ebel, J.) (applying distinction to Second Amendment claim), *cert. denied*, 136 S. Ct. 1486 (2016). "The government often has more flexibility to regulate when it is acting as a proprietor (such as when it manages a post office) than when it is acting as a sovereign (such as when it regulates private activity unconnected to a government service)." *Id.*

Thus, in First Amendment cases, too, the Court has recognized that "[w]here the government is acting as a proprietor, managing its internal operations, rather

than acting as a lawmaker with the power to regulate or license, its action will not be subjected to the heightened review to which its actions as a lawmaker may be subject." *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992). For example, when the government enters the marketplace to provide airport facilities, mail delivery, and public transportation, the property it manages for those purposes does not necessarily become a public forum for speech. And speech restrictions applicable to those faciliities will generally be evaluated for reasonableness, rather than subjected to strict scrutiny, if they do not reflect efforts to suppress particular viewpoints. *See id.* at 678–79; *United States v. Kokinda*, 497 U.S. 720, 725–26 (1990); *Lehman v. Shaker Heights*, 418 U.S. 298, 303 (1974).

The Court's decisions have long characterized the government's management of its relations with its workers as falling within the heartland of its role "as proprietor, to manage [its] internal operation[s]." *Cafeteria & Rest. Workers v. McElroy*, 367 U.S. 886, 896 (1961). "Time and again [the Court's] cases have recognized that the Government has a much freer hand in dealing 'with citizen employees than it does when it brings its sovereign power to bear on citizens at large.'" *NASA*, 562 U.S. at 148 (quoting *Engquist v. Ore. Dep't of Agric.*, 553 U.S. 591, 598 (2008)). "The government's interest in managing its internal affairs requires proper restraints on the invocation of rights by employees when the workplace or the government employer's responsibilities may be affected." *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 392–93 (2011).

Thus, under the First Amendment, "the government as employer indeed has far broader powers than

does the government as sovereign." *Waters v. Churchill*, 511 U.S. 661, 671 (1994) (plurality opinion). Those powers reflect the "practical realities of government employment," *id.* at 672, and "the nature of the government's mission as employer," *id.* at 673. The Court has recognized that "governments hire employees to do [their] tasks as effectively and efficiently as possible," and that employees "who [are] paid a salary so that [they] will contribute to an agency's effective operation" may be subject to restrictions reflecting the government's "interest in achieving its goals as effectively and efficiently as possible." *Id.* at 675. Indeed, that interest "is elevated from a relatively subordinate [one] when [the government] acts as sovereign to a significant one when it acts as employer." *Id.* Limits on the scope of First Amendment protections in the context of governmental employment relationships "are justified by the consensual nature of the employment relationship and by the unique nature of the government's interest." *Borough of Duryea*, 564 U.S. at 388.

This Court has therefore adopted an approach to First Amendment issues in the area of public employment that differs significantly from that applicable when the government, as sovereign, impinges on the speech rights of private citizens. As elaborated by the Court in the decades since its seminal opinion in *Pickering v. Board of Education*, 391 U.S. 563 (1968), that approach involves balancing speech interests of employees against the government's interests as employer. *See id.* at 417. Before such balancing even occurs, however, an employee must demonstrate that the speech for which she claims protection is speech in her capacity "as a citizen" and addresses "a matter of public concern." *Lane v. Franks*, 134 S. Ct. 2369, 2377–78 (2014); *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006);

San Diego v. Roe, 543 U.S. 77, 82–84 (2004) (*per curiam*); *Connick v. Myers*, 461 U.S. 138, 143 (1983). If employee speech meets that threshold for protection, "the next question"—and the determinative one—"is whether the government had 'an adequate justification for treating the employee differently from any other member of the public' based on the government's needs as an employer.'" *Lane*, 134 S. Ct. at 2380 (quoting *Garcetti*, 547 U.S. at 418).

II. The government's use of a collective bargaining system allowing employees to designate a bargaining representative supported by agency fees is a legitimate exercise of its function of managing workplace relations.

In light of the framework this Court has developed for taking into account the capacity in which challenged government activities are undertaken, any suggestion that the interactions between an exclusive bargaining representative for government workers and their government employer are identical to lobbying—political speech aimed at influencing the actions of the government as sovereign—is mistaken. *See, e.g.*, Pet. Br. 10–18. Rather, the government's structured interaction with a bargaining representative, and its authorization of employee funding for the representative's fulfillment of its duties, is an exercise of its proprietary function of managing employee relations that satisfies the level of scrutiny appropriate when the government acts in that capacity.

Both fundamental tasks in which the bargaining representative participates—collective bargaining and representing employees in resolving grievances—in-

volve communicating and interacting with the government employer within the structure of the collective bargaining system established and regulated by the government in its capacity as market participant, employer, and workplace manager. The negotiation of collective bargaining agreements involves the determination of contractual provisions that define the terms and conditions under which the government participates in the labor market. The resolution of employee grievances likewise is central to the government's proprietary function of managing its workplaces. *See, e.g.*, *Borough of Duryea*, 564 U.S. at 393–93. Both tasks involve highly structured processes, and participation by employee representatives in those processes is not the equivalent of exercising speech rights in the public arena to lobby legislators or other policymakers.

The First Amendment provides substantial protection to public employees who participate in public debates on matters of policy. *See, e.g.*, *Pickering*, 391 U.S. at 568–72; *see also Waters*, 511 U.S. at 674; *City of Madison Joint Sch. Dist. v. Wisc. Employment Relations Comm'n*, 429 U.S. 167, 174–777 (1976). It does not, however, guarantee government employees the ability to participate in the mechanisms the government chooses to use to perform its proprietary function of managing its workplaces. By operating workplaces, creating mechanisms for establishing the terms and conditions of employment that govern them, and managing them in accordance with those mechanisms and the terms and conditions established through them, the government does not create public forums in which employees have a right to speak. *See Minn. State Bd. for Comty. Colleges v. Knight*, 465 U.S. 271, 280–83 (1984); *cf. Lee*, 505 U.S. at 678–79 (facilities operated

by government in proprietary capacity are not traditional public forums); *Kokinda*, 497 U.S. at 725–26 (same).

Indeed, the government can choose not to bargain with its employees at all. *See Smith v. Ark. State Highway Employees, Local 1315*, 441 U.S. 463 (1979). Conversely, if it chooses to engage in collective bargaining, it can provide for employee election of a bargaining partner and exclude others from the procedural channels through which it structures its negotiations. *See Knight*, 465 U.S. at 286–87; *see also Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983) (holding that school district can give employees' bargaining representative preferential access to an internal mail system as part of its power to reserve that nonpublic forum "for its intended purposes"). Individual public employees have "no special constitutional right to a voice in the making of policy by their government employer" that overrides the government's choice of how to bargain, and with whom, over the terms and conditions of their employment. *Knight*, 465 U.S. at 286.

Moreover, to the extent the government chooses to bargain with employees, it is reasonable for it to require that employees contribute funds to support the operations of a single negotiating partner charged with representing their interests. Any negotiating process requires identification of the parties to the negotiation, and a negotiation over uniform terms and conditions of employment that will govern employees as a group is logically organized as a bilateral one. The state's interest in "effective and efficient management" of employee relations, *Duryea*, 564 U.S. at 398, would be sig-

nificantly impaired if it could not recognize a negotiating counterpart. "'There must be a limit to individual argument in such matters if government is to go on.'" *Knight*, 465 U.S. at 285 (quoting *Bi-Metallic Investment Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915) (Holmes, J.)). The government's decision to establish a system in which its negotiating counterpart is an organization chosen by a democratic vote of the affected employees to represent them within that system is not constitutionally *required*, but it is surely constitutional—and reasonable. *See id.* ("Absent statutory restrictions, the state must be free to consult or not to consult whomever it pleases.").

The requirement that employees pay fees to support the exercise of the bargaining functions is a reasonable exercise of the government's authority to structure its relationship with employees. To the extent that individual employees who disagree with the bargaining representative's positions (or with the concept of collective bargaining to begin with) contend that the payment constitutes compelled subsidization of speech with which they disagree, the level of First Amendment scrutiny to which that claim is subject is no greater than the scrutiny applicable to a claim that their exclusion from direct participation in the bargaining process restricts their speech. *Cf. Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 797–98 (1988) (describing "constitutional equivalence" of scrutiny applicable to restriction and compulsion of fully protected speech). Thus, consideration of a compelled-speech challenge must also reflect the context of the challenged action, including the capacity in which the government is acting and the level of scrutiny appropriate

to actions undertaken in that capacity.[2] Here, the same balancing analysis that governs restrictions on speech that are incidental to the government's management of its workplaces, and its choice of using a bargaining process to do so, is applicable to a claim of compelled speech subsidization in the same setting.

Such analysis supports the conclusion that, when the government authorizes a collective bargaining system to determine terms and conditions for employment and to administer workplace grievances, and when employees have exercised their right to vote for a representative, ensuring adequate funding of the collective bargaining process that is an essential part of that system is a reasonable way of advancing the government's interests in "effective and efficient management" of employee relations. *Duryea*, 564 U.S. at 398. The reasonableness of that choice is underscored by the duties owed by the bargaining representative to represent fairly the interests of all represented employees in the bargaining and grievance processes. The funding is thus part of a "collective enterprise," *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 469 (1997), to negotiate in the mutual economic interest of employees, and in which their participation as individuals has legitimately been "constrained," *see id.*[3] Viewed

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[2] *See, e.g., Corder v. Lewis Palmer School Dist.*, 566 F.3d 1219, 1231 (10th Cir.) (applying same scrutiny to speech restriction and compulsion in school setting), *cert. denied*, 558 U.S. 1048 (2009).

[3] That the fees are part of such a collective approach to participation in the ordering of employment relations with the government distinguishes them from assessments used to subsidize speech merely for its own sake in the absence of "a more comprehensive program restricting marketing autonomy," which this Court held unconstitutional in *United States v. United Foods, Inc.*, 533 U.S. 405, 411 (2001).

through the lens of the First Amendment scrutiny appropriate when the government acts in its capacity as employer managing workplace relations (a capacity absent in *Harris v. Quinn*, 134 S. Ct. 2618 (2014)), such reasonable assessments, limited to activities directly tied to bargaining over and implementation of agreements governing the terms and conditions of employment, do not violate the First Amendment.

That the agency fees at issue here comport with the First Amendment is underscored by the absence of any restriction on individual employees' freedom to speak, or of compelled subsidization of speech with which they disagree, in settings removed from the sphere of collective bargaining. Employees who disagree with their collective bargaining representative on policy issues and other matters of public concern are free to express that disagreement by participating in public debate on those subjects, *see, e.g.*, *Pickering*, 391 U.S. at 568–72, and by supporting and associating with organizations that reflect their views.[4] Moreover, the bargaining representative itself is prohibited from using agency fees for political and lobbying advocacy that are not sufficiently related to its role in the bargaining process. *See Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 519–22 (1991).[5] Thus, agency fees neither limit individual employees in participating in public debates addressed to

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[4] Political activities by public employees may, of course, be subject to restrictions to prevent performance of public duties from being corrupted by improper partisan considerations, *see U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 564 (1973), if such restrictions satisfy the *Pickering* balancing test. This case does not involve any such restrictions.

[5] Whether *Lehnert* articulated the proper test for distinguishing permissible from impermissible expenditures is not presented by this case. *See* Br. for Respondent AFSCME 46–47.

the government in its capacity as sovereign or lawmaker, nor improperly compel speech with which employees disagree in that realm.

Of course, when employees enter public debates seeking to influence the government's exercise of its powers, they have no more assurance than any other citizen that their voices will carry the day. By contrast, when the government in its proprietary capacity enters into a formal negotiation process using a mechanism it has created to develop the contractual terms and conditions governing its employment relationships, the government necessarily undertakes to listen to the collective bargaining representative selected by its employees for that purpose. That undertaking, however, does not "impair[] individual [employees'] constitutional freedom to speak." *Knight*, 465 U.S. at 288. The freedom to speak as a citizen does not "require government policymakers to listen or respond to individuals' communications on public issues." *Id.* at 285; *see also Smith*, 441 U.S. at 464–65 ("The First Amendment right to associate and to advocate provides no guarantee that a speech will persuade or that advocacy will be effective.") (internal quotation marks and citation omitted). Nor does the government's responsiveness to one speaker require it to give equal attention to another: "A person's right to speak is not infringed when government simply ignores that person while listening to others." *Knight*, 465 U.S. at 288.

Employees are free to speak out against a collective bargaining agreement or use the political process to oppose it, but they have no complaint if their efforts are not effective. Nor do their interests in freedom of speech give them the right to veto their government employer's chosen means of establishing terms and

conditions of employment: an adequately funded system of collective bargaining with a representative chosen by the majority of a bargaining unit and charged with pursuing the economic interests of the government employees who make up that unit. Thus, longstanding principles governing the application of the First Amendment to the government's actions in its capacity of employer strongly counsel against overruling *Abood*.

CONCLUSION

This Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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